

**Letter of Findings Number: 04-20171258, 10-20171257
Sales Tax and the Food and Beverage Tax
For Tax Years 2014-2016**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Indiana restaurant was able to prove that the Department's categorization of the restaurant as a fast food restaurant versus a dine-in restaurant was incorrect. However, Restaurant's documentation was insufficient to prove that it recorded cash sales properly.

ISSUE

I. Proposed Assessments—Gross Retail and Food & Beverage Taxes.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-5-4; IC § 6-2.5-2-1; IC § 6-9-20-4; IC § 6-9-12-7; *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014).

Taxpayer protests the imposition of sales tax as well as the food and beverage tax.

STATEMENT OF FACTS

Taxpayer is an Indiana restaurant. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records. Overall, the audit determined that "the [T]axpayer . . . failed to retain adequate documentation of its taxable sales." The audit made adjustments to total sales for bar sales and credit card sales. Further, the audit discovered that "the [T]axpayer reported no cash sales on the sales tax return during the audit period." In order to calculate cash sales for the audit period, the Department utilized a consumer payments study completed by Total System Services ("Study"). The Study provided cash as a percentage of total sales for each audit year. These percentages varied depending on whether an entity was categorized as a dine-in restaurant, fast-food restaurant, or coffee shop. The audit categorized Taxpayer as a fast food restaurant and used the corresponding percentages to calculate cash as a percentage of sales for each year and thus came to a total sales number for each year. This resulted in an assessment of additional sales tax as well as additional food and beverage taxes. Taxpayer disagreed with this categorization and filed a protest to that effect. Taxpayer initially offered settlement, but after several attempts to reach an agreement, Taxpayer withdrew their offer. An administrative hearing was then conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Proposed Assessments—Gross Retail and Food & Beverage Taxes.

DISCUSSION

Taxpayer operates a restaurant in Indiana. The Department conducted an audit review on Taxpayer's books and records for tax years 2014 - 2016. The Department determined that "[T]axpayer had failed to retain adequate documentation of its taxable sales." Taxpayer's total sales were adjusted for unreported bar sales and credit card sales. Those adjustments are not at issue.

The audit also found that Taxpayer did not report cash sales on any of its sales tax returns during the audit period. Cash register tapes were requested for the audit period, but none were provided. The auditor ate lunch at Taxpayer's restaurant and paid with cash. When the auditor requested a receipt, the taxpayer responded that they

did not have receipts, but did write the amount paid on the back of a business card. The amount charged did not include tax. The auditor's cash "was taken to the back room for change [and] there wasn't a cash register in sight."

As a result, the audit adjusted Taxpayer's total sales for unreported cash sales. The audit did this by using the Study and classifying Taxpayer as a fast food restaurant to get the appropriate cash as a percentage of sales numbers for the years at issue. In its protest letter, Taxpayer disagrees with this classification and argues that it should have been classified as a dine-in restaurant, whose cash as a percentage of total sales numbers are significantly lower than that of a fast food restaurant. Taxpayer supports its argument by stating that it "has table side service via waiters and waitresses. The restaurant utilizes a hostess to among other things seat customers, maintain a wait list and to take reservations. [Further], [t]he restaurant uses table [cloths], cloth napkins, washable plates and metallic utensils." Additionally, Taxpayer argues that the auditor did not have a clear understanding of how Taxpayer recorded and reported cash sales, and therefore overlooked the cash sales reported.

As a threshold issue, it is a taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014).

Indiana imposes a sales tax under IC § 6-2.5-2-1 which states that "[a]n excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana." The county where the Taxpayer's restaurant is located imposed a tax on all food and beverages served by restaurants in the county. IC § 6-9-20-4. This tax, called the Food and Beverage tax, is imposed, paid, and collected in the same manner as state gross retail tax. IC § 6-9-12-7.

A. Categorization

The first argument Taxpayer makes is that in categorizing Taxpayer for purposes of determining cash sales as a percentage of total sales, the auditor incorrectly categorized Taxpayer as a fast food restaurant, whereas Taxpayer believes it is more properly categorized as a dine-in restaurant. In describing Taxpayer's restaurant, the audit states Taxpayer "offer[s] eat in and carry out . . . food and also serve[s] alcohol. The [T]axpayer is open Tuesday through Sunday for lunch and dinner between the hours of 11 a.m. and 10 p.m. Lunch specials are priced at \$8.00 each. Dinners are priced between \$9.00 and \$18.00 per entrée." The audit does not directly address why it classified Taxpayer as a fast food restaurant, though from context the reason appears to be that Taxpayer's sales are "lower dollar purchases for restaurants." Taxpayer, on the other hand, explains that it "has table side service via waiters and waitresses. The restaurant utilizes a hostess to among other things seat customers, maintain a wait list and to take reservations. [Further], [t]he restaurant uses table [cloths], cloth napkins, washable plates and metallic utensils." Additionally, as noted by the audit, Taxpayer has a bar and serves alcohol. Taxpayer has met its burden under IC § 6-8.1-5-1(c) to show that it should be classified as a dine-in restaurant rather than a fast food restaurant. The Department will adjust the proposed assessments to reflect this change.

B. Recording of Cash Sales

Taxpayer also argues that the auditor did not have a clear understanding of how Taxpayer recorded its cash sales on a daily basis, and it was this misunderstanding that led to the additional tax assessed. First, it should be pointed out that, "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4. In addition, IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times." IC § 6-8.1-5-4(c).

Taxpayer provided documentation purporting to prove that its average daily cash sales for the years at issue were approximately five percent. Taxpayer claims that the auditor did not review this documentation during the audit. Upon review of the documentation, it is the Department's determination that whether the auditor reviewed the

documentation or not, it is not sufficient to prove that Taxpayer recorded and reported cash sales properly. The documentation shows how Taxpayer arrives to a best guess at daily cash sales rather than an accurate calculation of cash sales. Taxpayer did not meet the requirement of IC § 6-8.1-5-4 of keeping records. Taxpayer has not met the burden imposed under IC § 6-8.1-5-1(c) of proving the proposed assessment wrong regarding its protest of cash sales.

FINDING

Taxpayer's protest regarding the categorization of its restaurant is sustained. However, Taxpayer's protest regarding the additional documentation it provided is denied. Both the sales tax and food and beverage tax calculations will be revised.

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